

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2002 -

In the Matter of Petitions to Change Place of Use and Purpose of Use
For Water Right Permits 1267, 1268, 1271, and 2492
of Oroville-Wyandotte Irrigation District (OWID)
and Permits 11516 and 11518 of
OWID and Yuba County Water District (YCWD)

And Petitions for Extension of Time for
Permits 11516 and 11518 of
OWID and YCWD.

SOURCES: South Fork Feather River, Slate Creek, and Lost Creek

COUNTIES: Butte, Yuba

**ORDER ON PETITIONS FOR CHANGE IN PURPOSE AND PLACE OF USE,
PETITIONS FOR EXTENSION OF TIME, AND PARTIAL REVOCATION**

1.0 INTRODUCTION

On October 16, 2000, the State Water Resources Control Board (SWRCB) held an evidentiary hearing on petitions filed by OWID and YCWD. OWID petitions the SWRCB to add municipal and industrial uses as authorized purposes of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518 and to consolidate its place of use under the six permits to cover its current service area boundaries. OWID also petitions for an extension of time until December 1, 2004, to complete construction and application of water to beneficial use under Permits 11516 and 11518. YCWD, which jointly holds Permits 11516 and 11518 with OWID, petitions the SWRCB to add Yuba City to the authorized place of use under Permit 11518, to add municipal use as a purpose of use, and to add a point of diversion and rediversion on the Feather River near Yuba City to the permit. The SWRCB also considered partial revocation of Permit 1268 in the proceeding.

After considering the evidence in the hearing record and the arguments of the parties, in this Order the SWRCB conditionally approves OWID's petitions to add municipal and industrial uses

to the six permits and to change its place of use. The SWRCB also conditionally approves YCWD's petition to add Yuba City to the place of use under Permit 11518. The petitions for extension of time for Permits 11516 and 11518 are partially denied and partially held in abeyance. This Order partially revokes Permit 1268.¹

2.0 FACTUAL AND PROCEDURAL BACKGROUND

2.1 History of Jointly Held Permits

OWID and YCWD jointly hold Permits 11516 and 11518 (Applications 13957 and 14113) for the South Fork Project. The decisions of the SWRCB's predecessors,² Decision D 838 (1955) and Decision D 907 (1958), describe in detail the history of the districts' water right applications and joint project. (YCWD 6, 8.)

Briefly, in Decision D 838, the State Engineer determined that water right applications separately filed by OWID and YCWD were in mutual conflict and that it was in the public interest for the districts to undertake a joint water project to provide an adequate water supply to both districts' service areas. (YCWD 6.) The State Engineer deferred further action on the applications to allow OWID and YCWD to enter into an agreement to construct and operate a joint water project and to submit the necessary change petitions to the Division of Water Resources. In 1958 the districts entered into an agreement to construct the South Fork Project and OWID's Applications 13957 and 14113, among others, were amended to name YCWD as a joint applicant. (YCWD 7, 9.) In Decision D 907, the State Water Rights Board approved OWID's applications and ordered that the permits issued pursuant to the applications, including Permits 11516 and 11518 that were subsequently issued on Applications 13957 and 14113, be subject to the 1958 agreement between OWID and YCWD. (YCWD 8.) On December 9, 1959, the districts amended their agreement and the State Water Rights Board accordingly amended the permits,

¹ This order is not a precedent decision and may not be expressly relied on as precedent. (Gov. Code § 11425.60, subd. (a); SWRCB Order WR 96-1 at 17, fn. 11.)

² The SWRCB's predecessors include the State Engineer and the State Water Rights Board.

including Permits 11516 and 11518. (YCWD 13, 14.) Permits 11516 and 11518 continue to be to subject to the terms of the districts' agreement, as amended.³

2.2 South Fork Project Facilities

OWID developed and operates the multiple-purpose South Fork Project, shown on Figures 1 and 2. The primary purpose of the project is to develop irrigation and domestic water supplies for OWID and YCWD. (YCWD 12, p. 2.) OWID also holds a federal license for hydroelectric power generation that expires in 2010. OWID has constructed seven reservoirs on the South Fork Feather River and tributary streams and has built a diversion facility on Slate Creek, a tributary to the North Yuba River.

OWID diverts water from the South Fork Feather River to storage in the 94,700 acre-foot (af) capacity Little Grass Valley Reservoir. The South Fork Diversion Dam, which is located on the South Fork Feather River about 8.5 miles downstream of Little Grass Valley Reservoir, intercepts reservoir releases and natural flows. The water is then conveyed 2.5 miles through a tunnel to the upper end of the 65,600 af capacity Sly Creek Reservoir on Lost Creek, a tributary of the South Fork Feather River. The water that bypasses the South Fork Diversion Dam continues to flow downstream into the 352 af capacity Forbestown Reservoir located just downstream of the confluence of Lost Creek and the South Fork Feather River. Water released from Forbestown Reservoir either flows downstream in the South Fork Feather River to the 4,750 af capacity Ponderosa Reservoir or is conveyed through a penstock to the Forbestown power plant and discharged from the power plant into Ponderosa Reservoir.

Water exiting the Ponderosa Reservoir either continues downstream to Lake Oroville (a Department of Water Resources facility) or is diverted into Miners Ranch Canal, which terminates in the 815 af capacity Miners Ranch Reservoir. Water released from the Miners

³ The districts subsequently amended their agreement in 1965 to allow YCWD to provide domestic service to customers in the Forbestown area. (YCWD 18, 19.) The 1959 agreement between OWID and YCWD, as amended, is referred to herein as the "OWID-YCWD agreement."

Ranch Reservoir is directed to one of the following facilities: (1) Bangor Canal; (2) a domestic distribution system; or (3) Kelly Ridge tunnel and penstock.

Sly Creek Reservoir receives water from four sources: Lost Creek, Sly Creek, water imported from the South Fork Feather River, and Slate Creek. Slate Creek flows are intercepted by the Slate Creek Diversion Dam and conveyed via a 2.5 mile-long tunnel to Sly Creek Reservoir.

Water flows from Sly Creek Reservoir into the 5,920 af capacity Lost Creek Reservoir located immediately below Sly Creek Dam. Flows exiting Lost Creek Reservoir can be directed to the South Fork Feather River, where the water flows into the Forbestown Reservoir, thence Ponderosa Reservoir. Alternatively, the water can be directed from Lost Creek Reservoir into the Woodleaf Penstock and thence to either the Woodleaf Power Plant or the Forbestown Ditch. Water in the Forbestown Ditch flows to YCWD, OWID's customers on the ditch, or the 350 af capacity Lake Wyandotte. OWID diverts water from Lake Wyandotte to serve its customers in the Lost Horizon Drive area.

YCWD does not own or operate any onstream diversion or storage facilities associated with the jointly held permits. All water used in YCWD's service area under the permits is delivered by OWID via the Forbestown Ditch. Two turn-outs from the Forbestown Ditch are used to deliver 3,700 afa to YCWD: the Costa Creek turnout for irrigation deliveries and the Forbestown Water Treatment Plant for domestic uses.

Table 1 summarizes the South Fork Project's facilities and applicable water rights. Permits 1267, 1268, and 2492 allow domestic, irrigation, and recreational uses. Permits 1271, 11516, and 11518 allow domestic and irrigation uses. The South Fork Project also generates hydroelectric power under separately held water rights that are not under consideration in this proceeding and are not identified in Table 1.

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D R A F T

October 8, 2002

| TABLE 1 ⁴ | | | | | |
|--|----------------------|--------------------------|---------------------------------|--------------------------|---------------|
| Facility Name and Actual Size | Permit (Application) | Source | Direct Diversion (cfs) (Season) | Storage (af) (Season) | Permittee |
| Forbestown Reservoir 352 af | * | S.F. Feather River | | | |
| Lake Wyandotte 350 af | * | Lost Creek and Sly Creek | | | |
| Little Grass Valley Reservoir 94,700 af | 1267 (1651) | S.F. Feather River | | 109,012 (10-1 to 7-1) | OWID |
| | 11518 (14113) | S.F. Feather River | | 50,500 (11-1 to 7-1) | OWID/ YCWD |
| Lost Creek Direct Diversion | 1271 (2979) | Lost Creek | 185 (1-1 to 12-31) | | OWID |
| | 2492 (2778) | Lost Creek | | | OWID |
| | 11518 (14113) | Lost Creek | 50 (4-1 to 6-1) | | OWID/ YCWD |
| | | | 350 (1-1 to 12-31) | | |
| Miners Ranch Reservoir 815 af | * | S.F. Feather River | | | |
| New York Flat Reservoir (Proposed Size 40,000 af) | 1268 (2142) | Lost Creek | | 40,000 (10-1 to 7-1) | OWID |
| Ponderosa Reservoir 4,750 af | * | S.F. Feather River | | | |
| | | | | | |
| Slate Creek Reservoir 223 af | 11516 (13957) | Slate Creek | | 5,400 (1-1 to 7-1) | OWID/ YCWD |
| | | | | | |
| Slate Creek Direct Diversion | 11516 (13957) | Slate Creek | 300 (5-1 to 11-1) | | OWID/ YCWD |

⁴ Permit 11518 authorizes storage of 117,300 af: 77,300 af from the South Fork Feather River and 40,000 af from Lost Creek. This table identifies the permitted reservoirs and actual storage in each facility, which amounts to 104,300 af.

| TABLE 1 (Continued) | | | | | |
|--|----------------------|--------------------|---------------------------------|-------------------------|---------------|
| Facility Name and Actual Size | Permit (Application) | Source | Direct Diversion (cfs) (Season) | Storage (af) (Season) | Permittee |
| Sly Creek Reservoir 65,600 af | 2492 (2778) | Lost Creek | | 25,000 (10-1 to 6-1) | OWID |
| | 11516 (13957) | Slate Creek | | 29,600 (1-1 to 7-1) | OWID/ YCWD |
| | 11518 (14113) | S.F. Feather River | | 48,000 (11-1 to 7-1) | OWID/ YCWD |
| S.F. Feather River Direct Diversion | 1267 (1651) | S.F. Feather River | 200 (4-1 to 7-1) | | OWID |
| | 11518 (14113) | S.F. Feather River | 350 (1-1 to 12-31) | | OWID/ YCWD |

*The SWRCB has no record of a water right for Forbestown Reservoir, Lake Wyandotte, Miners Ranch Reservoir, or Ponderosa Reservoir.

2.3 Change Petitions filed by OWID

On March 8, 1989, OWID filed petitions for change in the place and the purpose of use, which it subsequently amended in 1997 and 2000. OWID petitions the SWRCB to add municipal and industrial purposes to Permits 1267, 1268, 1271, 2492, 11516, and 11518 and to consolidate OWID’s place of use under the six permits to cover its present service area boundaries.

2.4 Change Petition filed by YCWD

On June 7, 1982, YCWD filed a petition to add Yuba City’s service area to the place of use under Permit 11518 and to add municipal use as a purpose of use. Yuba City diverts water from the Feather River into its water distribution system, approximately 50 miles downstream of Lost Creek Reservoir (the farthest downstream point of diversion under Permit 11518). Although the map filed with the petition identified a point of diversion and rediversion on the Feather River, the petition did not request the addition of those points to the Permit. On August 17, 2000, YCWD supplemented its change petition with a request to add Yuba City’s intake facilities on the Feather River as a point of diversion and rediversion.

2.5 Petitions for Extension of Time

The time to complete construction under Permits 11516 and 11518 ended on December 1, 1964, and the time to complete beneficial use ended on December 1, 1975. In March 1980 OWID filed petitions for an extension of time to complete construction and the full beneficial use of water. The SWRCB issued notice of the time extension petitions in 1980, 1991, and 2000.

2.6 Protests

Due to the passage of time since the petitions were first noticed, on July 19, 2000, the SWRCB issued another public notice and provided another opportunity to protest the districts' petitions for change and for time extension.

2.6.1 Protest filed by the California Sportfishing Protection Alliance

In 1991 the California Sportfishing Protection Alliance (CSPA) filed a protest against the petitions for extension of time for Permits 11516 and 11518 alleging that approval of the petitions would have potential adverse environmental impacts. On July 28, 2000, CSPA filed a protest based on environmental grounds against all of the change petitions and time extension petitions identified in the SWRCB's July 19, 2000, notice. CSPA's protest also alleged that the water rights for New York Flat Reservoir (Permit 1268) should be revoked because the facility has not been built. The Division of Water Rights (Division) accepted the revocation issue as a protest issue and requested additional information supporting CSPA's environmental allegations. CSPA did not respond.

2.6.2 Protest filed by OWID

On March 8, 1983, OWID filed a protest against YCWD's change petition based on the following grounds: (1) the two districts jointly hold Permit 11518, and consequently, both entities must join in or approve the proposed change before the SWRCB may grant any change petition; (2) the OWID-YCWD agreement limits the use of water under the permit to Yuba County, whereas Yuba City is in Sutter County; (3) the release from priority⁵ granted by the

⁵ A release from priority is a waiver by the state of the priority of a state-filed application in favor of an application filed by the recipient of the waiver. (See Wat. Code § 10504.)

California Water Commission and by the Department of Water Resources to OWID and YCWD for Application 14113 (Permit 11518) is subject to the March 21, 1958, agreement between OWID and YCWD and any amendments to the agreement mutually agreed upon by the districts, and OWID has not agreed to change the service area; and (4) if the petition is granted and YCWD delivers water to Yuba City, then that water will not be available to OWID at the outlet of Kelly Ridge Powerhouse.

2.6.3 Protest filed by YCWD

On August 17, 2000, YCWD filed protests against OWID's petitions to change the place of use in the six permits alleging public interest considerations and injury to vested rights. YCWD noted that, pursuant to provisions of the December 9, 1959, agreement between YCWD and OWID, YCWD did not protest OWID's petitions that would enlarge the place of use in Permits 11516 and 11518, to the extent those changes would include additional lands located within both Butte County and OWID's boundaries. YCWD alleged that the proposed changes would increase OWID's diversion and use of water from the South Fork Project and thereby reduce the amount of available water for YCWD's use. YCWD stated that its protest could be resolved if the SWRCB included conditions in the six permits that would allow YCWD to receive sufficient water from the South Fork Project "to satisfy its present and projected future water needs."

3.0 HEARING ISSUES

The SWRCB held a hearing on October 16, 2000, in accordance with a notice issued September 12, 2000. The hearing notice identified several key issues, including: (1) whether the SWRCB should approve the petitions for change in purpose and place of use for (i) addition of municipal and industrial purposes of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518, (ii) addition to OWID's place of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518, and (iii) addition of Yuba City as a place of use under Permit 11518; (2) whether the SWRCB should approve the petitions for extension of time for Permits 11516 and 11518 or find cause to revoke the permits, in part or in full; (3) whether the SWRCB should revoke authorization to store 40,000 afa in New York Flat Reservoir under Permit 1268; (4) what the status is of the environmental documentation for the actions requested by the petitioners; and (5) whether approval of the petitions would result in adverse impacts on public trust resources.

4.0 PARTIES TO THE HEARING

In addition to YCWD and OWID, Yuba City was designated a party to the hearing pursuant to California Code of Regulations, title 23, section 648.1, subdivision (b).⁶ Yuba City appeared in support of YCWD’s petition to add the city as a place of use under Permit 11518.

CSPA did not file a Notice of Intent to Appear at the hearing and did not participate in the proceeding. CSPA is hereby dismissed as a party to the proceeding. (Cal. Code Regs., tit. 23, § 648.1, subd. (c).)

5.0 DETERMINATION OF HEARING ISSUES

5.1 Change Petitions

Water Code sections 1700 through 1705 govern changes in the place of use, purpose of use, or point of diversion, of an appropriative water right. Permission to make such change must be granted by the SWRCB and “[b]efore permission to make such a change is granted the petitioner shall establish, to the satisfaction of the [SWRCB], and it shall find, that the change will not operate to the injury of any legal user of the water involved.” (Wat. Code § 1702.) The petitioner must establish that the proposed change will not effectively initiate a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).)

5.1.1 Petitions for Change in Purpose of Use filed by OWID

OWID seeks to add municipal and industrial uses to Permits 1267, 1268, 1271, 2492, 11516, and 11518. No protests were filed against the proposed changes in the purpose of use and no objection was raised at the hearing. (See YCWD Closing Brief, p. 9 (stating it has no objection to OWID’s request to add municipal and industrial uses to the permits).) There is no evidence in the record that the addition of municipal and industrial uses to the six permits would operate to the injury of any legal user of water; accordingly, the SWRCB finds that the changes will not result in any injury and conditionally approves the petitions.

⁶ Section 648.1, subdivision (b) states: “In a water right proceeding, the party or parties shall include the water right applicant or petitioner, persons who have filed unresolved protests, . . . and any other persons who are designated as parties in accordance with the procedure specified in the hearing notice.”

To ensure that the water is used efficiently and that the permittee acts diligently, the changes in purposes of use are approved subject to the development and submittal of a water conservation program to the Chief, Division of Water Rights, within 180 days from the date of this Order. Because OWID experiences approximately 80 percent conveyance losses, the water conservation program must evaluate and address the conveyance losses. (R.T. 77:4-9.) The petitions will be deemed denied if the permittee fails to timely submit the water conservation program to the Division.

Further, OWID's General Manager testified that he could not allocate OWID's diversion and use under its six permits to a specific water right. (R.T. 115:17-20.) OWID must separately document its annual water use under each permit on the "Progress Report by Permittee"⁷ forms furnished by the Division. Finally, the SWRCB will issue amended permits that include updated permit terms regarding map requirements for larger projects, endangered species, and water quality standards and objectives.

5.1.2 Petition for Change in Place of Use filed by OWID

OWID also seeks to expand its place of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518 to cover its present service area boundaries. YCWD objects to the proposed change,⁸ arguing that enlargement of OWID's place of use could increase OWID's diversion and use of water from the South Fork Project and thereby reduce the amount of project water available to YCWD. YCWD, however, does not object to OWID's change petition if the SWRCB imposes permit conditions to ensure that sufficient water is available under Permits 11516 and 11518 to meet YCWD's "reasonable present and future water needs." (YCWD Closing Brief, p. 9.)

⁷ After the water rights are licensed, OWID must separately report its water use under each right on the "Progress Report by Licensee" forms furnished by the Division.

⁸ YCWD states that, in accordance with the provisions of part II. E of the OWID-YCWD agreement, the district does not protest OWID's petitions to enlarge the place of use under Permits 11516 and 11518 to include lands that are located both within Butte County and within OWID's boundaries. According to the uncontroverted testimony of OWID's general manager, all lands are both within Butte County and eligible for inclusion within OWID's service boundaries. (OWID C, pp. 1-2.) Apparently then, YCWD does not protest the petitioned changes to Permits 11516 and 11518.

YCWD, however, failed to provide evidence linking approval of the change to a reduction in the amount of project water available to YCWD or to any other harm. To the contrary, YCWD's General Manager testified that he didn't know if approval of OWID's change petitions would have a direct impact on YCWD's water supply availability. (R.T. 206: 21-207:1.) OWID's General Manager testified that there would be no injury to any user of water resulting from enlargement of the place of use. (R.T. 32:2-4.) YCWD will continue to receive the amount of water allowed under the jointly held permits and the OWID-YCWD agreement. The SWRCB finds that the change will not injure any legal user of water and approves OWID's petition for change in the place of use.

5.1.3 Petition for Change in Place of Use filed by YCWD

YCWD requests the SWRCB to grant its change petition so that YCWD can continue to sell 4,500 af of South Fork Project water to Yuba City. Specifically, YCWD seeks to provide a supplemental water supply to Yuba City by amending Permit 11518 as follows: (i) adding a point of diversion or redirection on the Feather River, and (ii) adding a new place of use at Yuba City.⁹ YCWD asserts that the change will not injure any legal user of water and that approval of YCWD's petition will not violate the OWID-YCWD agreement. OWID requests the SWRCB to deny YCWD's petition to add Yuba City to the place of use until the OWID-YCWD agreement is amended to allow such change. (R.T. 32:9-11; 109:11-15.)

5.1.3.1 Agreement between OWID and YCWD

A threshold issue is whether the proposed change in the place of use—the addition of Yuba City, which is in Sutter County—is permissible under the terms of Permit 11518 and the agreement between OWID and YCWD to which Permit 11518 is subject. The relevant portions of the agreement state, in part:

⁹ YCWD's request to add municipal uses to Permit 11518 has been disposed of by the SWRCB's conditional approval of OWID's petition for change in the purposes of use of its six permits, including Permit 11518. The conditions imposed apply to either co-permittee who seeks to divert water for municipal or industrial use.

[Part II.] “The parties hereto agree and consent to and approve:

* * *

C. The amendment of said Applications of Oroville to include as an additional place of use such area in Yuba County as Yuba may designate, to include Yuba as an applicant, and to provide for additional points of diversion and use of water, to the following extent and within the following limits, to-wit:

1. The amount of 3,700 acre feet per annum for Yuba diverted into Forbestown Ditch
2. The amount of four thousand five hundred acre feet per annum to be diverted by Yuba . . . at the outlet from Miners Ranch Terminal Reservoir
3. After construction of storage facilities adequate to store the water, an additional amount up to 10,500 acre feet to be delivered to Yuba at Miners Ranch Terminal Reservoir

* * *

E. The amendment of said applications of Oroville numbered 13957 and 14113 and permits issued thereon [Permits 11516 and 11518] to include as additional places of use such additional land in Butte County as Oroville may from time to time determine to include within its boundaries.” (YCWD 13.)

In construing the agreement, the SWRCB is mindful of contract law that prohibits adding terms to a contract that are beyond the scope of the parties’ contractual intent. Civil Code section 1648 requires the interpretation of a contract to be limited to its evident object: “However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.” The agreement neither expressly allows nor prohibits adding Yuba City as a place of use. In consenting to specified changes, without reference to other possible changes, the agreement obviously would allow OWID or YCWD to oppose a change not addressed in the agreement, but nothing in the agreement prohibits either district from proposing such a change.

The parties have not submitted any evidence that the agreement was intended to prohibit the parties from petitioning for changes that are not expressly consented to in the agreement. In fact, it appears that the purpose of Part II was to include YCWD as a co-applicant on OWID’s applications and that neither party contemplated service outside either Yuba or Butte County at the time of the agreement. The agreement does not expressly address whether either district

could amend jointly held permits to include a place of use in Sutter County and the SWRCB will not add such a term in construing the agreement.

Moreover, in the past, both districts have sought to serve water to Yuba City and to add Yuba City to the place of use under the permits without amending the agreement. “The ‘construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.’ (Citations omitted.)” (*Whalen v. Ruiz* (1953) 40 Cal.2d 294, 301 [253 P.2d 457, 461].) In 1965 YCWD and Yuba City entered into an agreement to provide the city with 4,500 afa of water at either the outlet of the Miners Ranch Terminal Reservoir or the outlet of the Kelly Ridge Power Plant on the Feather River. (Yuba City 6, pp. 2 (¶ 3), 3 (¶ 6).) Yuba City began pumping water from the Feather River in 1969. (R.T. 225:23-226:7.) In 1980 OWID agreed to sell water to YCWD that the district would in turn sell to Yuba City. (Yuba City 10; see R.T. 96:12-23 (testimony that OWID was aware of water sale to Yuba City for at least thirty years).) The agreement expressly acknowledged both parties’ earlier agreement and YCWD’s contract with Yuba City:

“[YCWD] proposes to enter into an Agreement to provide water in the approximate amount of 4,500 acre feet to the City of Yuba City for the period ending December 31, 2010. That water is water provided by O.W.I.D to [YCWD] pursuant to the terms of the contracts entered into between the parties.” (Yuba City 10, p. 1 (¶ 1).)

Thus, until 1980, both districts participated in agreements to sell water to Yuba City and there is no indication that the terms of the OWID-YCWD agreement were a source of controversy between the parties.

In 1982 YCWD filed its petition to add Yuba City as a place of use. By this time, however, relations between the districts apparently had soured and OWID protested the petition, arguing, in part, that Part II.C. of the agreement incorporated into the permit limited YCWD’s uses to the area within Yuba County. (OWID C, ex. 1.) The acts and conduct of the districts prior to any controversy in 1982, however, supports the SWRCB’s decision to construe the agreement to allow adding Yuba City as a place of use to Permit 11518. In sum, the Water Code provides for

changes in the place of use and, absent express language or practical construction by the parties to the contrary, the SWRCB will not construe an agreement to prohibit a change that may be otherwise permissible under law.

Aside from any limitations that may be established by agreement among the co-permittees, there is an issue whether the SWRCB should require the concurrence of each co-permittee before the SWRCB will consider a request concerning a jointly held permit. Neither the Water Code nor the SWRCB's regulations require co-permittees to jointly sign change petitions or other requests for SWRCB action, and the SWRCB has not found it necessary to impose such requirement in the past. There may be cases, however, it would be appropriate for the SWRCB to impose such a requirement in its discretion. In this case, the co-permittees have a long, contentious history.¹⁰ Both districts have argued that their agreement prevents the other from serving Yuba City.¹¹ Yet, at various times, both districts have entered into water purchase agreements to serve Yuba City without amending the agreement. Nonetheless, although the SWRCB prefers the districts to agree between themselves as to their relative rights and duties under the jointly held permits, the SWRCB will not require such concurrence at this time. The SWRCB will, however, include a term in the permits acknowledging the SWRCB's continuing authority to change or add terms or conditions that are necessary to resolve, in the public interest, issues arising from alleged conflicts in the provisions of the agreement.

5.1.3.2 Injury to Legal User of Water

The evidence in the record supports a finding that the proposed change will not result in injury to any legal user of water. OWID admits that it will not suffer physical injury from YCWD's sale of water to Yuba City in Sutter County. (R.T. 108:16 – 109:1.) OWID also testified that it does

¹⁰ In fact, in 1992 the SWRCB's Executive Director recommended that the SWRCB not approve change petitions to add Yuba City to the place of use of OWID or YCWD until the two districts have reached agreement or taken other action to clarify their relative rights and duties with respect to their jointly held water right permits. (SWRCB 7, p. 6.)

¹¹ In 1988 Yuba City entered into an agreement with OWID to purchase water. (Yuba City 11.) Believing that a petition to add Yuba City as a place of use would soon follow, YCWD argued to the Division that such agreement violated Part.II.E., above. (SWRCB 6, Letter from Robert C. Epley, Arostegui, Cooke, Epley & Gengler to the Division, dated January 17, 1989.)

not have the infrastructure to use the 4,500 af of water after the water is delivered to the Kelly Ridge Power Plant and thence to the Feather River. (R.T. 106:20 – 107:1.) Moreover, OWID does not need the water that is currently sold to Yuba City, never anticipated using the water, and is not deprived by delivery of water to the city. (R.T. 107:2-6; 109:2-10; 111:9-15.) In its closing brief, OWID withdrew its 1983 protest to YCWD's change petition. (OWID Closing Brief, p. 5.) There are no other protests raising the issue of injury to a legal user of water. The SWRCB finds that no legal user of water will be injured by the proposed change.

5.1.3.3 Initiation of New Right

YCWD's petition seeks, in part, to add points of diversion and rediversion from the Feather River at Yuba City. The Feather River is not identified as a source under Permit 11518 and to ensure that the addition of a point of diversion would not effectively initiate a new right, this Order contains a condition requiring the permittee to demonstrate that the SWRCB's approval of the change will not result in a net increase in diversion. The permittee must demonstrate that the natural and abandoned flow at the Lost Creek or South Fork Feather River points of diversion for Permit 11518 is sufficient to cover both existing direct diversions by the co-permittees and the new diversion at Yuba City.

The Feather River may be added as a point of rediversion for water stored and released under Permit 11518. In order for the diversion of water at Yuba City to be considered a point of rediversion under Permit 11518, the water must originate in one of the storage facilities authorized under the permit, be released from storage, and then be diverted at Yuba City. To ensure that the reservoir releases are coordinated with the rediversion at Yuba City, YCWD must submit a reservoir operations plan that, at a minimum, identifies the reservoir(s) that will be used to serve Yuba City, specifies the dates when reservoir releases will be made to serve Yuba City and the rate (in cubic feet per second (cfs)) that water will be released from storage for subsequent rediversion at Yuba City, and includes a provision for measuring diversions at Yuba City. If releases will vary on a seasonal basis, all release rates must be specified. The reservoir operations plan shall be subject to the review, modification, and approval of the Chief, Division of Water Rights. The plan shall be updated whenever there is a modification in the reservoir

releases to serve Yuba City and the revised information shall be submitted to the Chief, Division of Water Rights for approval.

YCWD, however, does not have physical or operational control over the South Fork Project facilities and the diversions of water. (R.T. 208:10-13.) OWID owns the facilities, makes all diversions (direct diversion, rediversion, and diversion to storage), and operates all weirs and control valves to release the water and measure the water. (R.T. 117:22-25.) YCWD receives its water via conveyance through the OWID diversion works and does not control the water by requesting releases from specified reservoirs or diversions from a specific source. The water in the system is commingled, and at any time, YCWD may receive water from reservoir releases, direct diversion, or a combination thereof. (R.T. 120:2-20.) Because YCWD does not have physical control over, or access to, the storage facilities, it must reach an agreement with OWID to coordinate reservoir operations with the rediversion of water at Yuba City. The reservoir operations plan must identify the basis of YCWD's authority (i.e., agreement) to control such releases.

The SWRCB approves the addition of Yuba City as a place of use under Permit 11518, subject to these conditions. Absent compliance with these conditions, YCWD may be subject to an enforcement action for the unauthorized diversion of water if YCWD continues to serve Yuba City. (Wat. Code § 1052.) In the meantime, Yuba City has a water supply under its own permits and its contract with the Department of Water Resources. (R.T. 220:20-222:3.)

5.1.4 The California Environmental Quality Act and the Public Trust Doctrine

Under the California Environmental Quality Act (CEQA), the SWRCB is a responsible agency for purposes of considering whether to approve the change petitions. As a responsible agency, the SWRCB must consider the environmental documentation prepared by the lead agency, and any other relevant evidence in the hearing record, and reach its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).)

OWID is the lead agency for the preparation of environmental documentation for its change petitions. On June 24, 1997, OWID adopted a Negative Declaration (SCH #92063071) for the

expansion of place of use and related actions for Applications 1651, 2142, 2778, 2979, 13957, and 14113 (Permits 1267, 1268, 1271, 2492, 11516, and 11518).

On March 22, 1985, Yuba City filed a Notice of Determination and a Negative Declaration for the proposed water delivery from OWID and YCWD of up to 35,000 afa. (SWRCB 6.) The project contemplated in the Negative Declaration included YCWD's petition to change the place of use. The record is silent as to whether YCWD has taken any action under CEQA.

The SWRCB has reviewed the Negative Declarations, which concluded that the proposed projects would not have a significant effect on the environment. The SWRCB has considered the Negative Declarations in deciding whether to approve the change petitions.

Regardless of any obligation the SWRCB may have under CEQA, the SWRCB has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].) There is no evidence that the project will have any adverse impacts on public trust resources.

5.2 Petitions for Extension of Time filed by OWID

Permits 11516 and 11518, which were issued in 1958, require construction work to be completed by December 1, 1964, and the beneficial use of water to be completed by December 1, 1975. OWID requests an extension of time until December 1, 2004, which is the same completion date as OWID's other four permits (Permits 1267, 1268, 1271, and 2492). (R.T. 38:12-22.) YCWD argues that the portions of the permits that apply to OWID should be revoked, but that the SWRCB should grant YCWD an extension of time under the permits. (YCWD Closing Brief, pp. 13-15.) Because Permits 11516 and 11518 are jointly held, the SWRCB will consider both permittees' diligence in constructing the project and putting water to beneficial use.

5.2.1 Applicable Law

Water Code section 1396 requires a permittee to prosecute project construction and beneficial use of water with due diligence, in accordance with the Water Code, the SWRCB's regulations,

and the terms specified in the permit. The SWRCB may approve a request for an extension of time if the SWRCB finds that there is good cause for the extension. (Wat. Code § 1398, subd. (a).) The SWRCB's regulations allow an extension of time to be granted only on such conditions as the SWRCB determines to be in the public interest, and on a showing to the SWRCB's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (Cal. Code Regs., tit. 23, § 844.) The SWRCB generally will not accept conditions incident to the person and not to the enterprise as good cause for delay. (*Ibid.*) After a hearing on a petition for an extension of time, the SWRCB may revoke the permit. (Wat. Code § 1398, subd. (b); § 1410, subd. (a) – (b)(1).)

5.2.2 Time to Complete Construction

OWID has not constructed any diversion or storage facilities since the 1960s and OWID's Power Division Manager testified that OWID has no plans to construct additional facilities under Permits 11516 and 11518. (R.T. 122:9-14.) The evidence indicates that OWID considers its construction to be complete.

YCWD has not constructed any facilities to directly divert or to store water from the sources identified in Permits 11516 and 11518. (R.T. 200: 8-13.) YCWD constructed one conveyance facility in 1964, the Dobbins-Oregon House Canal,¹² and has not developed other water supply facilities since then. (R.T. 202:14-203:2.) Although the OWID-YCWD agreement allows the construction of storage facilities adequate to store an additional amount of 10,500 af, and also states that Yuba shall own certain storage facilities that it may construct, those facilities have not been built. (YCWD 13, parts II.C.3, V.B.) Thus, in over 40 years, YCWD has not developed water supply facilities allowed under the permits and the agreement.

¹² Water from the Forbestown Ditch that is released into Costa Creek flows into Dry Creek and is rediverted at the Brownsville Diversion Dam into the Dobbins-Oregon House Canal. (R.T. 152:19-153:7.)

The evidence in the record does not support a finding that there is good cause to extend the time for the co-permittees to complete construction. Accordingly, an extension of time to complete construction under Permits 11516 and 11518 is denied.

5.2.3. Time to Complete Beneficial Use of Water

As explained herein, the SWRCB partially denies and partially holds in abeyance OWID's petitions for extension of time. The evidence in the record does not support a finding that there is good cause to extend the time for the co-permittees to make full beneficial use of the 768,080 af of water authorized under Permits 11516 and 11518. A full denial of the time extension, however, would limit the co-permittees to their 1975 levels of water use when a license for the project is issued to the co-permittees. The SWRCB finds that it is in the public interest to give the co-permittees an opportunity to pursue a time extension to the extent it would allow the co-permittees to be licensed at their current level of water use instead of their 1975 level of use.

5.2.3.1 Due Diligence

In determining whether there is good cause to approve OWID's request for an extension of time to complete the beneficial use of water, the SWRCB must consider whether the co-permittees have exercised diligence over the past 40 years in putting water to beneficial use. Due diligence requires a demonstrable effort to put water to beneficial use within the time period specified in the permits. (But see 25 Ops.Cal.Atty.Gen. 32, 40 (1955) (noting that diligence may require something more than simply complying with time limits in permits).)

OWID appropriates water from the South Fork Project under its six water rights, including jointly held Permits 11516 and 11518. The total annual diversion and use allowed under the six permits is limited to 810,000 afa. (See, e.g., SWRCB 3 (Permit 1271, Order dated July 25, 1985).) Permits 11516 and 11518 authorize the total diversion of 768,080 af,¹³ subject to the 810,000 af limitation applicable to the six permits. OWID's General Manager testified that

¹³ Converting direct diversion into acre-feet. Permit 11516: 109,296 af by direct diversion (300 cfs x 185 days x 1.98 af/day/cfs = 109,890 af) + 35,000 af storage = 144,890 af. Permit 11518: 252,945 af by direct diversion (350 cfs x 365 days x 1.98 af/day/cfs) (SF Feather) + 117,300 af storage (SF Feather + Lost Creek)+ 252,945 af by direct diversion (350 cfs x 365 days x 1.98 af/day/cfs) (Lost Creek) = 623,190 af. The total for both permits is 768,080 af.

OWID uses approximately 27,000 afa under all six water rights and that he couldn't allocate this amount to a specific water right. (R.T. 115:17-20.)

YCWD contends that it diligently has applied water to beneficial use to the maximum extent possible under present contractual conditions. (YCWD Closing Brief, p. 19.) Under the terms of the Agreement incorporated into the jointly held permits, YCWD is limited to 3,700 afa plus certain surplus water on request at Forbestown Ditch and to 4,500 afa at Miners Ranch Reservoir. (YCWD 13; 4, p. 3; R.T. 119:10-14.) In 1991, YCWD received 3,647 af from Forbestown Ditch. (YCWD 5, p. 9, table 5.) The evidence indicates that YCWD has diligently put the 3,700 afa to beneficial use.

Both districts have used a portion of the water outside their authorized places of use. YCWD cannot directly use the 4,500 af of water available at Miners Ranch Reservoir due to its lower elevation and considerable distance from YCWD's service area. (YCWD 2, p. 3.) Instead, YCWD sells the water to Pacific Gas & Electric (PG&E) for non-consumptive power generation at the Kelly Ridge Powerhouse. Since 1969, YCWD has then sold the water to Yuba City under a 1965 agreement between YCWD and Yuba City. (R.T. 227: 21-25; YCWD 2, p. 3.) Until approved by this order, however, Yuba City, however, was not authorized as a place of use under the joint permits. OWID also has used water outside its authorized place of use.

A permittee must apply the water to beneficial use in accordance with the Water Code, the SWRCB's regulations, the terms of the permit, and within the period specified in the permit. (Wat. Code § 1397.) A permittee cannot support an extension of time by identifying the diversion and use of water outside an authorized place of use in an attempt to show water use under the permit. Such diversion and use is not made under the permit; instead it is unauthorized and made without a claim of right. (See SWRCB Order WR 85-4 (concluding that the permittee's diversion of water at an unauthorized point of diversion and outside the season of diversion did not support an extension of time).)

Nonetheless, even if the SWRCB considered quantities of water used outside the authorized places of use, the co-permittees at best have put approximately 27,000 afa of water to beneficial

use under the combined permits during the past four decades.¹⁴ To the extent OWID's water rights are duplicative, a portion of this amount would be credited to its senior permits before being credited to the junior jointly held permits.¹⁵ Moreover, as discussed below, neither co-permittee has complied with the requirements of the CEQA in filing the time extension petitions. The co-permittees have not exercised diligence in putting the full amount of water authorized under the jointly held permits—768,080 afa—to beneficial use.

5.2.3.2 Obstacles Not Reasonably Avoided

The SWRCB must also consider whether the co-permittees' failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. Lack of finances and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay. (Cal. Code Regs., tit. 23, § 844.)

YCWD asserts that its inability to apply more water to beneficial use under Permits 11516 and 11518 has been occasioned by obstacles that could not reasonably be avoided, specifically the limits on water diversions imposed by the 1960 power purchase contract between OWID and PG&E. It is unclear why YCWD identifies the power purchase contract as an obstacle.

Although the contract identifies the amounts that OWID may divert for its use and YCWD's use, the total maximum amounts are the same as those contained in the agreement between OWID and YCWD. (YCWD 13, p. 2 (part II.C.1-2); 15, pp. 13-14 (¶ I.C-2(a)-(b)).) YCWD negotiated and accepted the terms of the OWID-YCWD agreement, including the limitations on the district's diversion and use of water. YCWD's inability to apply more water to beneficial use under the permits has been occasioned by its own agreement, and not by any unavoidable obstacle.

¹⁴ This amount is comparable to OWID's diversions in 1955 when the district diverted a total of 27,500 af (gross duty) at its various points of diversion in its service area. (YCWD 6, p. 80.)

¹⁵ OWID's four senior water right permits were issued in 1923 and 1926. (R.T. 28:12-23.) Diverted water is first credited to the senior right to the limit of that right. (SWRCB Order WR 85-4, p. 5.) Only diversions in excess of the senior right or under conditions not authorized by the senior right can be credited to the junior right.

Moreover, the 1960 power purchase contract provided a revenue source to fund bonds for the construction of the South Fork Project. (YCWD 2, p. 2; 15.) The availability of this revenue source allowed the project to proceed in the first place. (YCWD 2, p. 2.) Thus, the contract is not an obstacle to YCWD's development of project facilities or use of water; instead, it is a necessary component of the South Fork Project's development.

In any event, YCWD has not developed all of the water supply facilities allowed under either the OWID-YCWD agreement or the power purchase contract. For example, the OWID-YCWD agreement allows YCWD to construct facilities to store up to an additional 10,500 afa and the power purchase contract allows YCWD to increase its diversions from the Forbestown Ditch from 12 cfs to 72 cfs on completion of YCWD's proposed diversion from Canyon Creek. (YCWD 13, p. 2 (part II.C.3); YCWD 15, p. 13, (§ C-2(a)).) Even if YCWD was unable to fund construction of these facilities, lack of finances is not generally accepted as good cause for delay. The evidence does not support a finding that the delay was occasioned by obstacles not reasonably avoided.

5.2.3.3 Satisfactory Progress

Evidence in the record before the SWRCB indicates that the co-permittees will not make satisfactory progress if the SWRCB grants an extension of time to complete beneficial use of the 768,080 afa of water.

OWID

To date, OWID has only appropriated a small quantity of water, approximately 27,000 afa under its six water right permits, compared to the total amount of 768,080 afa allowed under Permits 11516 and 11518. The evidence indicates that OWID will not complete full beneficial use of the permitted amount of water.

First, OWID acknowledged that the 810,000 afa limitation on its annual diversion and use under its six permits greatly exceeds the South Fork Project's yield of 340,000 af in an average year. OWID admitted that it was unlikely that it would use the rights exceeding the project's yield. (R.T. 114:11-22.)

Second, for over forty years, the amount of water available for beneficial use has been limited by OWID's 1960 power purchase contract with PG&E, which imposes specific limits on the diversion of water for consumptive use by OWID and YCWD. Diversions to the Forbestown Ditch are limited to 14,420 afa (10,720 afa by OWID and 3,700 afa by YCWD) at a rate of 38 cfs, except when Lost Creek Reservoir is spilling, the diversion rate may increase to 50 cfs. (YCWD 15, p. 13 (¶ C-2(a)).) Diversions at Miners Ranch Reservoir are limited to 42,439 afa at a rate of 125 cfs. (*Id.* at p. 14 (¶ C-2(b)).) OWID may increase this amount by a total of 26,000 afa if it meets certain conditions but there is no evidence in the record that it has ever done so. OWID may divert 17,555 afa at a rate of 40 cfs to the Palermo Canal and, subject to certain limitations, any water that otherwise would spill past the Palermo Canal Diversion Dam. (*Id.* At C-2(c)).) Adding these annual diversion limits together, OWID's diversions are limited by contract to approximately 71,000 afa (10,720 + 42,439 + 17,555 = 70,714).¹⁶

Third, OWID's average annual diversion of 27,000 afa is much less than that allowed under contract. Of this amount, approximately 6,000 afa is used for domestic purposes and after conveyance losses of approximately 80 percent, 4,200 afa is used for irrigation. (R.T. 75:14-20; 76:23-78:1.) OWID could not identify how much water it will consumptively use at full development, but the Oroville area historically has grown at a one percent rate. (R.T. 124:7-125:2.) YCWD estimates the future combined irrigation and domestic demands for OWID's service area, through 2040, to be 51,250 afa. (R.T. 164:9-166:2; YCWD 4, p. 20.) Even if OWID's growth rate increased, its diversions would need to more than double to reach the contractual limit of roughly 71,000 afa and they would need to increase by about ten times to reach the 275,000 afa allowed under Permits 1267, 1268, 1271 and 2492.¹⁷ There is no evidence indicating that such extraordinary growth would occur in that area.

¹⁶ By Memorandum of Understanding with PG&E, dated September 25, 1979, OWID agreed to further reduce its diversions from the South Fork Project by approximately 20,000 afa during the term of the OWID-PG&E contract. (R.T. 98:14-101:25; YCWD 21, part II.)

¹⁷ Again, diversions would be credited against the senior rights before the junior jointly held rights.

YCWD

YCWD asserts that satisfactory progress will be made if a time extension is granted. YCWD's General Manager testified that YCWD needs additional water supplies and that it cannot add new irrigation customers given its current supplies. (R.T. 184:17-24; YCWD 2, p. 4; 4, pp. 3-4.) YCWD's peak delivery demand of 16 cfs from the Forbestown Ditch exceeds the maximum delivery rate of 12 cfs. (YCWD 5, p. 3.) YCWD's historic rate of growth has ranged from 1 to 3 percent and the district estimates its long-term (to 2040) water supply demand within its service area to be 27,100 afa. (R.T. 206:12-19; YCWD 4, p. 5, table 2.) Of this amount, 23,700 afa can be supplied from the South Fork Project through the Forbestown Ditch under Permits 11516 and 11518. The district plans to develop a conveyance project, the Forbestown Conveyance Project, to deliver this supply from the Woodleaf Penstock to YCWD's service area. (YCWD 4, p. 1.)

The agreement to which the jointly held permits are subject, however, limits the amount of water supplied to YCWD to 3,700 afa plus certain requested surplus water diverted at Forbestown Ditch and 4,500 afa diverted at Miners Ranch Reservoir or the Kelly Ridge Powerhouse. (YCWD 4, p. 3; R.T. 119:10-15.) Further, OWID owns and operates the South Fork Project's facilities and YCWD has no access to or operational control over the project. Although YCWD asserts that it has several potential mechanisms for obtaining rights of access to additional South Fork Project water, including the imposition of certain conditions by Federal Energy Regulatory Commission on relicensing, these mechanisms are speculative at best. Moreover, although YCWD identified potential sources of money to finance the project, including the revenue it will receive from hydroelectric generation in 2010, it has neither specific construction plans nor financing in place. (R.T. 194:18-196:18; 197:22-199:2.) Accordingly, the record does not support a finding that YCWD will make satisfactory progress in completing beneficial use.

5.2.4 CEQA Compliance

Moreover, the co-permittees have not diligently pursued fulfilling their responsibilities under CEQA. CEQA applies to discretionary projects proposed to be carried out or approved by public agencies. (Pub. Resources Code, § 21080.) The SWRCB's decision whether to grant an extension of time is a discretionary act subject to CEQA. (Cal. Code Regs., tit. 14, § 15002, subd. (i); see tit. 23, § 844 (identifying factors to evaluate when considering a request for

extension of time).) OWID, as the petitioner for an extension of time, is the lead agency for the preparation of environmental documentation for the proposed time extension. Because the SWRCB's approval of a time extension and subsequent amendment of Permits 11516 and 11518 would authorize OWID (and YCWD) to complete the project and to apply water to beneficial use, the SWRCB's approval constitutes an approval of the project. Thus, the SWRCB is a responsible agency for purposes of considering whether to approve OWID's petitions.

The Division previously has informed the co-permittees that CEQA compliance is necessary to process a time extension petition. When OWID initially filed its change petitions, it also filed a petition to add Yuba City as a place of use. The Division explained that the SWRCB's approval of a time extension is one of the necessary elements for addition of Yuba City as a place of use and that OWID must prepare the appropriate environmental documentation to address any potential impacts related to the change and time extension petitions. (SWRCB 6 (letters from Katherine Mrowka, Division, to Jeffrey Meith, OWID dated Sept. 20, 1991, and Dec. 16, 1991).) The Division also explained that approval of the time extension petitions is a discretionary act subject to CEQA. (SWRCB 6 (letter from Katherine Mrowka, Division, to Jeffrey Meith, OWID (Dec. 16, 1991).) The Division provided YCWD with a copy of the letter. Without the co-permittees' compliance with CEQA, the SWRCB cannot approve the time extension petitions.

5.2.5 Public Interest

OWID and YCWD assert that approval of the time extension petitions is in the public interest. As discussed above: (1) the evidence in the record does not support a finding of good cause to grant an extension of time to make full beneficial use of the 768,080 afa authorized under Permits 11516 and 11518, and (2) the increased use of water after the time to put water to beneficial use expires cannot be counted for purposes of licensing the water right. (SWRCB Decision 1629, p. 36.) Consequently, the time to complete beneficial use of water under Permits 11516 and 11518 will have ended in 1975 and any water use since that time cannot be counted for licensing purposes. The SWRCB finds that it is in the public interest to give the co-permittees an opportunity to pursue a time extension to the extent it would allow the co-permittees to be licensed at their current level of water use, including amounts used in areas covered by the change petitions approved in this Order, instead of their 1975 level of use.

Accordingly, the SWRCB will hold in abeyance the portion of OWID's time extension petitions that would allow the co-permittees to be licensed based on their current needs and current levels of use.¹⁸

The SWRCB, however, cannot approve any time extension without compliance with CEQA. Accordingly, the co-permittees have one year from the adoption date of this Order to comply with CEQA and prepare environmental documentation.¹⁹ The co-permittees then may file a motion with the SWRCB to reopen the hearing record for the sole purpose of admitting this documentation and any party may object to such motion. The SWRCB then will consider the portion of the time extension held in abeyance. Absent compliance with CEQA by the above date, the petitions for time extension will be deemed denied in full.

In sum, the SWRCB denies the request for extension of time to make full beneficial use of the 768,080 af authorized under Permits 11516 and 11518, but will hold in abeyance the portion of the time extension petitions to the extent necessary to allow the co-permittees to divert and use water under the permits consistent with their current levels of use.

5.2.6 Licensing

The SWRCB directs the Division of Water Rights to conduct a licensing inspection and to license Permits 11516 and 11518 if the portion of the time extension petitions held in abeyance is

¹⁸ OWID has requested an extension until December 1, 2004. Providing an extension until that date will give the co-permittees the ability to provide records for use over a multi-year period, thus providing a more accurate picture of the amount needed to support existing uses than would reliance on records for any single year. Providing the extension as requested would also mean that the licensing period includes years for which the co-permittees are required to report separately the water use under each permit, in accordance with this order. By holding the requests for extension in abeyance it is not the intent of the State Water Resources Control Board to authorize or encourage any expansion in water delivery or use beyond that necessary to continue deliveries in accordance with current needs and current use patterns.

¹⁹ Preparation of the environmental documentation should not be difficult because the environmental impacts should be easy to assess. In practical effect, the effect of granting the extension will be to allow an increase in water use from 1975 levels to current levels. Ordinarily, the SWRCB will presume that any environmental impact report or negative declaration prepared by the petitioner is adequate for purposes of CEQA. (See Cal. Code Regs., tit. 14, § 15096, subd. (e).) This presumption applies only where the petitioner as lead agency has prepared environmental documents; it does not apply where the petitioner fails to comply with CEQA or concludes that the activity is exempt. (See *id.* § 15050 et seq.; Pub. Resources Code § 21167.3.)

denied or deemed denied, or if approved, on the conclusion of the extension period. The Division of Water Rights shall license Permits 11516 and 11518 for the project elements and quantities of water put to beneficial use that are not duplicative of project elements and beneficial use under Permits 1267, 1268, 1271, and 2492. If either co-permittee fails to timely provide the Division with the information needed to license the jointly held permits, the Division will revoke the permit elements for which the Division does not receive licensing information.

5.3 Partial Revocation of Permit 1268 (New York Flat Reservoir)

The SWRCB may revoke a permit if it finds that cause exists. (Wat. Code § 1410.) “There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with the this division and the rules and regulation of the [SWRCB].” (*Id.* at subd. (a).) Based on the evidence in the record, the SWRCB finds that OWID has not commenced, diligently pursued, or completed construction of New York Flat Reservoir and finds that there is cause for partial revocation of Permit 1268.

Permit 1268 (Application 2142) authorizes the diversion to storage of 5,000 afa in the Lost Creek Reservoir and 40,000 afa in New York Flat Reservoir on Lost Creek. OWID has received numerous extensions of time to develop the project since Permit 1268 was issued in 1923, but New York Flat Reservoir has not been built. The most recent extension of time to complete construction under Permit 1268 expired on December 1, 1990, and OWID has not filed a petition for extension of time to construct the facility.

In nearly eighty years, the permittee has not constructed New York Flat Reservoir and there is no evidence that permittee intends to construct the facility. Accordingly, the portion of Permit 1268 that authorizes diversion to storage of 40,000 afa at New York Flat Reservoir is revoked. The portion of Permit 1268 that authorizes diversion to storage at Lost Creek Reservoir is retained.

In its closing brief, YCWD suggests that Permit 1268 should be split into two permits and the New York Flat Reservoir portion should be assigned to YCWD. YCWD is not a co-permittee for Permit 1268 and there is no evidence in the record supporting such an assignment.

Moreover, YCWD's General Manager testified that the district has no plans to proceed with construction of the reservoir. (R.T. 194:5-15.) YCWD must obtain its own water right if it wants to construct the reservoir.

6.0 CONCLUSION

Based on the evidence in the record, the SWRCB conditionally approves OWID's and YCWD's petitions for change in the purpose of use and place of use. The SWRCB will require a water conservation plan for municipal and industrial uses under Permits 1267, 1268, 1271, 2492, 11516, and 11518 and operations plans for diversions of water to Yuba City under Permit 11518. The Division will issue amended permits for all six permits that include updated permit terms and conditions.

The evidence in the record does not support a finding of good cause to extend the time to complete construction and beneficial use of 768,000 afa of water under Permits 11516 and 11518. The SWRCB, however, finds that it is in the public interest to hold in abeyance the portion of the time extension petitions that would allow the co-permittees an opportunity to be licensed at their current level of water use instead of their 1975 level of use. The SWRCB also finds good cause to partially revoke Permit 1268.

ORDER

IT IS HEREBY ORDERED,

1. The petitions for extension of time are partially denied and partially held in abeyance. The portion of the petitions that would allow the co-permittees to complete construction is denied. The portion of the petitions that would all the co-permittees to complete application of 768,000 afa of water to beneficial use under Permits 11516 and 11518 is also denied. No further time extension to put this entire amount of water to beneficial use shall be granted for these permits.

The portion of the petitions for extension of time that would allow the co-permittees to apply water to beneficial use until December 1, 2004, and thus be licensed at their current level of water use, is held in abeyance. The co-permittees have one year from the adoption

date of this Order to comply with CEQA and prepare environmental documentation in support of approval of the time extensions. Absent compliance with CEQA by this date, OWID's petitions for time extension will be deemed denied in full.

If the portion of the time extension petitions held in abeyance is denied or deemed denied, Permits 11516 and 11518 shall be licensed based on the quantities of water diverted, collected, stored, and placed to beneficial use between July 12, 1960, and December 1, 1975 (the "licensing perfection period"). The permittee shall furnish all available meter records for its diversions under these permits to the Division of Water Rights (Division) within 180 days of the date the time extension is denied or deemed denied and shall furnish any other materials requested by the Division for licensing purposes within 90 days of any written request from the Division.

For Little Grass Valley Reservoir, Lost Creek Reservoir, Slate Creek Reservoir, and Sly Creek Reservoir, the permittees shall document the reservoir capacity, maximum amount of water collected to storage in any one season of diversion, the maximum amount of water held in storage at one time, the maximum withdrawn from storage and put to beneficial use within one season of use, and the maximum rate(s) of diversion to offstream storage from each source during the licensing perfection period.

For direct diversion from South Fork Feather River, Lost Creek, and Slate Creek, the permittees shall document the maximum rate of direct diversion, the 30-day average diversion rate for irrigation, and the 7-day average diversion rate for domestic and municipal use, from each source during the licensing perfection period.

The permittees shall document the maximum total amount of water appropriated and put to beneficial use in a twelve-month period by combined direct diversion and withdrawal from storage under Permits 11516 and 11518 during the licensing perfection period.

Licensing shall be based on the quantities collected to storage and off-stream storage, directly diverted, and put to beneficial use, after deducting the quantities diverted and

beneficially used under Permits 1267, 1268, 1271 and 2492. The permittees shall submit new engineered drawings for Permits 11516 and 11518 if the maps on file do not accurately reflect the as-built project(s), including points of diversion, rediversion, and diversion to offstream storage, conveyance facilities, and place of use (service area). The permittees shall document compliance with all permit conditions during the licensing perfection period.

The permittees shall furnish the water diversion and use records and the engineered maps (if necessary) within 180 days of the date the partial time extension is denied or deemed denied. If the required information, including permit compliance information, is not submitted in a timely manner, the Chief, Division of Water Rights is delegated authority to revoke any permit elements for which the required information is not submitted.

2. The petition to add Yuba City to the place of use under Permit 11518 and to add a point of diversion and rediversion on the Feather River is approved, subject to the following conditions:

No water shall be diverted for consumptive use from the Feather River at Yuba City until the permittee submits a direct diversion operations plan to the Chief, Division of Water Rights (Division Chief) and the Division Chief approves the plan. The operations plan must identify the following: (1) the quantity of natural and abandoned flow at the Lost Creek and South Fork Feather River points of diversion when Yuba City is diverting water; and (2) the quantity of natural and abandoned flow diverted by the permittees under Permits 1267, 1268, 1271, 2492, 11516, and 11518 at the Lost Creek and South Fork Feather River points of diversion to serve the permittees' place of use when Yuba City is diverting water. The plan must demonstrate that the diversion at Yuba City is always less than or equal to the quantity of natural and abandoned flow (1, above) minus the quantity diverted (2, above). All quantities shall be calculated after deducting from the quantity of natural and abandoned flows any bypass flows required now or in the future.

No water shall be rediverted for consumptive use from the Feather River at Yuba City until the permittee submits a reservoir operations plan to the Division Chief and the Division Chief approves the plan. The plan must identify the following: (1) the reservoir(s) that will be used to serve Yuba City; (2) the dates when reservoir releases will be made and the daily release rate (in cfs); and (3) a means for metering diversions at Yuba City. If releases will vary on a seasonal basis, all release rates must be specified. If reservoir releases are modified, the reservoir operations plan shall be updated and the revised reservoir operations plan is subject to approval of the Chief, Division of Water Rights.

If YCWD is responsible for the rediversion of water from the Feather River at Yuba City, the reservoir operations plan shall also identify the basis of YCWD's right to control such rediversions. Accordingly, no water shall be rediverted from the Feather River at Yuba City until the following actions are taken: (1) OWID and YCWD execute an agreement establishing sufficient control by YCWD over reservoir operations for the rediversion of water at Yuba City; (2) OWID and YCWD provide a copy of the agreement to the Division Chief; and (3) the Division Chief advises the co-permittees in writing that the agreement provides YCWD with the necessary operational control.

The permittee must separately report daily diversions at Yuba City on the Progress Reports by Permittee for Permit 11518 (and any subsequent license issued pursuant to Permit 11518).

3. The petitions to add municipal and industrial purposes of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518 are approved subject to the permittee's submission of a water conservation plan that meets the requirements for an urban water management plan under Water Code section 10620 et seq. and that is acceptable to the Chief, Division of Water Rights (Division Chief). YCWD shall submit a water conservation plan for use under Permit 11518. OWID shall submit a water conservation plan for use under Permits 1267, 1268, 1271, 2492, and 11516. In addition, the water conservation plans submitted by OWID shall evaluate and address ditch conveyance losses. No water shall be diverted for municipal and industrial purposes until the Division Chief accepts the plan.

The permittee also shall submit to the Division Chief any updates made in accordance with Water Code section 10621 and, at the same time, provide information regarding the permittee's implementation of any measures previously required by the Division Chief that are contained in the water conservation plan.

All cost effective measures in the water conservation program shall be implemented in accordance with the schedule for implementation found therein.

4. The petitions to change OWID's place of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518 are approved.
5. The element of Permit 1268 authorizing storage of 40,000 afa in New York Flat Reservoir is revoked. Amended Permit 1268 shall continue to authorize collection to storage of 5,000 afa in Lost Creek Reservoir.
6. Permits 11516 and 11518 are amended to include the following term: "The SWRCB will maintain continuing authority to change or add terms or conditions necessary to resolve, in the public interest, issues arising from alleged conflicts among the provisions of the agreement to which the permit is subject."
7. Permits 1267, 1268, 1271, 2492, 11516, and 11518 shall be amended and reissued to include the following conditions:

Pursuant to California Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the SWRCB in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the SWRCB may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the SWRCB determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the SWRCB also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the SWRCB determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution article X, section 2, is consistent with the public interest, and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the SWRCB if, after notice to the permittee and an opportunity for hearing, the SWRCB finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the SWRCB finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges

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which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 et seq.) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a “take” will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project.

Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

(0000014)

Permittee shall maintain records of the amount of water diverted and used to enable the State Water Resources Control Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code Section 1605. The permittee shall separately report water use under each permit (and after license issuance, for each license), on forms furnished by the SWRCB.

(0000015)

If it is determined after permit issuance that the as-built conditions of the project are not correctly represented by the map(s) prepared to accompany the application, permittee shall, at its expense have the subject map(s) updated or replaced with equivalent as-built map(s). Said revision(s) or new map(s) shall be prepared by a civil engineer or land surveyor registered or licensed in the State of California and shall meet the requirements prescribed in section 715 and sections 717 through 723 of title 23 of the California Code of Regulations. Said revision(s) or map(s) shall be furnished upon request of the Chief, Division of Water Rights.

(0000030)

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12. Permits 1267, 1268, 1271, 2492, 11516, and 11518 shall include all other terms and conditions presently in Permits 1267, 1268, 1271, 2492, 11516, and 11518 which have not been expressly revised, amended, or revoked from the permits by this order

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 17, 2002.

AYE:

NO:

ABSENT:

ABSTAIN:

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Maureen Marché
Clerk to the Board